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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1187.

LARRY E. KALODNER, Judge of the District Court of the United States for the Eastern District of Pennsylvania,
Petitioner,

vs.

WEBSTER EISENLOHR, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 120-140), in an original proceeding in that Court, is reported in 145 F. (2d) 316.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of

February 13, 1925, **but the petition was not filed in time** (see page 7, *infra*).

The decree of the Circuit Court of Appeals was made and entered December 28, 1944 (R. 140-141). The petition was not filed until April 21, 1945, more than three months thereafter.

Questions Presented.

The decree of the Circuit Court of Appeals directed the issuance of (1) a writ of mandamus directing the Hon. Harry E. Kalodner, District Judge, to vacate an order of reference to a Special Master in a matter entitled *Speese* v. *Webster-Eisenlohr, Inc.* and (2) a writ of prohibition enjoining said Special Master from proceeding under the order of reference. The questions here presented are:

1. Was the petition timely?

2. Did the District Court in the *Speese* case have jurisdiction to deal with the matters it attempted to refer to a Special Master?

3. Were mandamus and prohibition proper remedies to prevent the District Court from exceeding its jurisdiction by an interlocutory order of reference?

Statement.

This is an original proceeding which respondent, Webster-Eisenlohr, Inc., instituted in the Circuit Court of Appeals for the issuance of (1) a writ of mandamus directing the Hon. Harry E. Kalodner, District Judge, to vacate an order of reference to a Special Master, dated June 9, 1943, in a matter pending before the District Court entitled *Speese* v. *Webster-Eisenlohr, Inc.*, and (2) a writ of prohibition enjoining said Special Master from taking any

proceedings under said order of reference. These writs were sought on the ground that the District Court was wholly without jurisdiction of the matters covered by the order of reference (R. 1a-11a).

In the complaint in said case of *Speese* v. *Webster-Eisenlohr, Inc.*, the plaintiff alleges, in essence, that he is the owner of ten shares of preferred stock of the defendant (respondent in this Court), Webster-Eisenlohr, Inc., on which dividends have remained unpaid for a number of years; that the action is brought on behalf of all the preferred stockholders of defendant; the defendant's outstanding capital stock consists of 5,132 shares of preferred stock and 409,313 shares of common stock; that under defendant's Charter and By-Laws the preferred stock was not entitled to participate in the management unless two quarterly dividends were in arrears, in which event "full voting power shall be vested in the preferred stock"; that at the annual meeting of defendant's stockholders on March 10, 1942, the preferred stock was allowed to vote along with the common stock rather than to the exclusion of the common stock; and that under the Charter and By-Law provisions above quoted the preferred stockholders are entitled to exclusive voting power, to the exclusion of the common stock (R. 15a-19a). The complaint also contains conclusory allegations that defendant is dominated by The Chase National Bank of the City of New York through its ownership of a large block of common stock, and that the control and management of the defendant have been usurped by the holders of the common stock (R. 18a-19a). The relief sought is a declaration that the preferred stock has "exclusive voting power", so long as two quarterly dividends remain unpaid, and the appointment of a receiver pending "determination of the issues herein" (R. 19a).

Defendant's answer put in issue plaintiff's ownership of preferred stock. It admitted the allegations as to the provisions of its By-Laws, the non-payment of preferred stock dividends, the voting procedure followed at the annual stockholders meeting, its capitalization, assets and liabilities, but denied the remaining allegations of the complaint (R. 21a-25a).

The only issues thus before the District Court were (1) plaintiff's ownership of preferred stock and (2) the proper construction of the quoted phrase "full voting power" as used in defendant's Charter and By-Laws.

The complaint, although verified October 15, 1942 (R. 20a) was not served until February 1, 1943 (R. ii), shortly before the usual date for the annual meeting of respondent's stockholders.

At a preliminary hearing before Judge Kalodner on March 2, 1943, plaintiff's counsel, in open court, disclaimed any charge of fraud or mismanagement against respondent in these words: "Your Honor please, I am not pressing here, or saying, or alleging that I can prove at this time any fraud or mismanagement" (R. 44a).

On March 26, 1943, during pendency of the action, respondent, *pursuant to discussions initiated before the commencement of the suit*, mailed to *all holders* of its preferred stock a written offer to purchase their shares at $150 per share, flat (R. 4a, 34a, 113a). This offer was mailed only three days after respondent had mailed to all its stockholders, both common and preferred, its annual report for 1942 (R. 4a). This annual report set forth, clearly and in detail, the amount of preferred stock outstanding, its par value, its redemption value *and the accrued dividends, and also respondent's earnings for the year* (R. 31a).

With this information before them, holders of 4,047 out of 5,037 outstanding shares of respondent's preferred

stock accepted said offer (R. 35a). Included in the shares accepting the offer were plaintiff's ten shares, *which he apparently had disposed of* because they were turned in, under the offer, by a third party (R. 4a).

Although respondent's offer was made to *all* its preferred stockholders, not just to plaintiff, and was accepted by more than 80% of them,[1] including a Mr. Cullman, who, for years, was respondent's chief executive officer, and a Mr. Cohen who, for years, was a director, and although the offer was made after the commencement of the action and was not referred to in or complained of by any pleadings or other papers in the action or by any stockholder, creditor or other person interested in respondent, Judge Kalodner requested information concerning the offer. As a matter of courtesy respondent's counsel furnished such information to him (R. 113a-118a). Upon the basis of this information, and although no one had complained of the offer, Judge Kalodner took occasion to charge, in open court, upon a hearing on plaintiff's application for a continuance, that the offer was fraudulent (R. 53a, 55a, 58a, 62a-66a).

Thereafter, on May 24, 1943, when the matter came before Judge Kalodner upon a postponed hearing, plaintiff's counsel, in seeking a continuance advised Judge Kalodner that plaintiff no longer owned any stock and was not prepared to proceed with the case, that anyone else could be substituted to prosecute the case "but nobody wants to, as far as I know" (R. 74a-75a).

On June 9, 1943, Judge Kalodner, on his own motion, appointed one David Bortin, Esq., Special Master to make an *investigation* of respondent, its finances, and its offer to its preferred stockholders, and also to investigate whether

[1] Subsequently, the remaining outstanding preferred stock was redeemed (R. 136-137), so that none of the preferred stock is now outstanding.

there had been any violation of Rule X-10B-5 of the Securities and Exchange Commission relating to fraudulent and manipulative devices. The Master was directed to report not only to the District Court but also to the Securities and Exchange Commission and to the parties, and also to submit a summary of his report to respondent's creditors and stockholders (R. 13a-15a).

It will be seen that Judge Kalodner did not appoint a Special Master in the usual sense to take testimony and report, but that he ordered an investigation, rather than a judicial hearing, by the Special Master, as an arm of the Court. Moreover, said investigation was directed to matters which were not within the issues of the case before Judge Kalodner, and *of which no complaint had then or has since been made by anyone other than Judge Kalodner.*

Respondent moved to vacate the order of reference on the grounds, among others, that the matters referred were not within the issues of the case, that the investigation ordered was not a judicial function, and that no dismissal or compromise of the action was sought within Rule 23(c) of the Rules of Civil Procedure (R. 38a-39a, 85a). This motion was denied by Judge Kalodner (R. 97a).

Respondent then petitioned the Circuit Court of Appeals for writs of mandamus and prohibition directing the District Court to vacate the order of reference and prohibiting the Special Master from proceeding thereunder (R. 1a-12a). The matter was argued before three judges of the court below, and subsequently, by direction of the court, was reargued before the court sitting *en banc* (R. 119). On September 27, 1944, the Circuit Court filed its opinion (R. 120-127), two judges dissenting (R. 128-140), holding that the matters referred to the Special Master were not within the issues of the action (R. 124-126); that the District

Court could not do through a Special Master what it could not do directly (R. 124-125); that the investigation ordered was not the exercise of a judicial function (R. 126); that no dismissal or compromise of the action was involved under Rule 23(c) of the Rules of Civil Procedure (R. 126-127); and that respondent was entitled to the writs sought (R. 123). The Court stated in its opinion that it was "unlikely that the formal issuing of the writs prayed for will be necessary" (R. 127).

On December 28, 1944, the Circuit Court of Appeals made and caused to be entered its decree directing the issuance of the writs prayed for (R. 140-141).

On January 24, 1945, pursuant to said decree, the Clerk of the Circuit Court of Appeals issued said writs (R. 141-144). On March 3, 1945, within the time for filing a petition for certiorari, the Circuit Court of Appeals entered an order staying the execution of the writs of mandamus and prohibition pending application for certiorari (R. 145).

ARGUMENT.

I.

The petition was filed too late.

The decree of the Circuit Court of Appeals, directing the issuance of writs of mandamus and prohibition, was made and entered December 28, 1944 (R. 140-141). The petition for certiorari was not filed until April 21, 1945, more than three months after entry of said decree. This Court is therefore without jurisdiction. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942); *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, 418 (1923).

Petitioner has apparently assumed that the time for filing the petition did not begin to run until the issuance and service of the writs of mandamus and prohibition on January 24, 1945. But said writs were not, and do not purport to be, judgments or decrees of the court below. They were mere ministerial acts performed by the Clerk of that Court pursuant to the Court's final determination, set forth in its decree of December 28, 1944, that respondent's right to such writs had been established.[2] It is the correctness of this determination of the court below which petitioner seeks to have this Court review, not the acts of the Clerk of that Court in issuing the writs.

In *Department of Banking* v. *Pink*, 317 U. S. 264 (1942), the New York Court of Appeals, on June 18, 1942, affirmed a judgment and issued its remittitur to that court, which entered judgment on said remittitur on June 25, 1942. Thereafter, on July 29, 1942, the Court of Appeals amended its remittitur and on December 16, 1942, the lower court entered its judgment on the amended remittitur. A petition for certiorari filed October 20, 1942,—more than three months after the Court of Appeals issued its original remittitur—was denied as too late. This Court there said that the time for filing the petition ran from the entry of the judgment of the Court of Appeals which finally determined the case, leaving nothing to be done by the lower court "except the ministerial act of entering judgment on the remittitur";[3] and that the motion to amend the original remittitur did not extend the time for filing the petition

[2] It should be noted that the writs of mandamus and prohibition which were issued on January 24, 1945, themselves recite that they were issued pursuant to order of the Circuit Court of Appeals "entered" on December 28, 1944 (R. 142, 144).

[3] Cf., *Medhurst* v. *S. S. "South American"*, 264 U. S. 587 (1924); *Warshauer* v. *Lloyd Sabaudo*, 293 U. S. 610 (1934); and *Cahill* v. *Mayflower Bus Lines, Inc.*, 296 U. S. 629 (1935); also discussion of foregoing cases in Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States", page 775, footnote 29.

since said motion did not seek "a reargument or rehearing of any part of this case."

Writs of mandamus and prohibition are no more judgments or decrees than are writs of execution. Like writs of execution, they do not finally determine anything. They merely reflect and implement a prior determination of the court that the right to the writ involved has been established. *Cf. Wayman* v. *Southerd*, 10 Wheat. 1, 23 (1825).

The only judgment or decree of the Court below which is involved here was that entered December 28, 1944. Petitioner's time to apply for a writ of certiorari ran from that date. Accordingly, the petition was filed too late.

II.

Wholly apart from the fact that the petition was filed too late, this Court, in the exercise of its discretion, should deny the same.

No clearer case of an untimely petition could be presented. However, in view of the unfounded charges of fraud made against respondent by Judge Kalodner, it is appropriate to point out that, apart from the jurisdictional defect, the petition should be denied because the decision of the court below is clearly correct, there is no conflict of decisions, and the petition presents no issue of general importance.[4]

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[4] Judge Kalodner's unfounded charges of fraud against respondent are in no way germane to the issues before this Court and hence will not be discussed in the body of this brief. Since, however, such charges of fraud were made by a District Judge, although no alleged victim, or in fact anyone other than the District Judge has asserted any fraud, *and since a minority of the court below took cognizance of such charges despite the fact that said court had refused to hear respondent's counsel thereon* (see R. 126), we deem it appropriate, and a matter of simple justice to respondent, to demonstrate to this Court that such charges of fraud are wholly groundless. We do this in the Appendix, pp. 15-20, *infra*.

The sole issue before the District Court in the *Speese* case (aside from the question of plaintiff's ownership of preferred stock) was whether the preferred stockholders were entitled, under respondent's Charter and By-Laws, to *exclusive* voting power so long as two quarterly dividends remained unpaid. Pending the action, respondent made an offer to *all* the holders of its preferred stock, not merely to plaintiff, to purchase the same; and pursuant to such offer respondent acquired 4,047 of its outstanding 5,037 shares of preferred stock, including the 10 shares which had been registered in the name of the plaintiff, Speese. When Judge Kalodner was advised of these facts, through information made available, at his request, by respondent, Judge Kalodner charged in open court that the offer to purchase said stock was fraudulent (R. 53a, 58a, 62a-66a), although no such charge had been made by any preferred stockholder or anyone else; and thereafter, on June 9, 1943, on his own motion, Judge Kalodner referred the case to a Special Master to make an investigation of respondent, its finances and its offer to its preferred stockholders, and also as to whether there had been any violation of Rule X-10B-5 of the Securities and Exchange Commission relating to fraudulent and manipulative devices. The Master was directed to report not only to the District Court but to the Securities and Exchange Commission and to the parties and to submit a summary of his report to respondent's creditors and stockholders (R. 13a-15a).

The Circuit Court of Appeals held that the order of reference was wholly beyond Judge Kalodner's jurisdiction, stating (R. 123-124):

> "The fundamental proposition which probably no one would dispute is that a court's power is judicial only, not administrative nor investigative. A judgment may only be properly given for something

raised in the course of a litigation between the parties [Footnote, citing cases, omitted]. Now, what was the litigation in this case? The complaint presents the question of the legal effect of the provision that preferred stockholders, under given circumstances, shall have full voting power. Whether full voting power means that they may vote along with holders of shares of the common stock or whether 'full' as used in the certificate of incorporation means 'exclusive' is a question of interpretation of language to be made with such help as the Pennsylvania decisions give, since the corporate litigant is a Pennsylvania corporation. * * *

"If the plaintiff's contentions on voting rights are upheld as a matter of law, the preferred stockholders are entitled to determine who shall manage the corporation, and other questions which may be determined by stockholders. They are entitled to court help to get those rights if they need it. On the other hand, if the plaintiff's contentions as to the meaning of the phrase are incorrect, they have alleged no legal grounds for complaint. While a receiver was asked for, it was simply in connection with the relief to be given the plaintiff, based on the correctness of this theory of his voting rights. No one disputed the solvency of the corporation.

"*The directions given the Master went far beyond anything involved in the issues presented in the litigation,* * * *." (Italics supplied.)

This decision is clearly correct. It is firmly established that under Article III, Sections 1 and 2, of the Constitution, district courts are limited to the exercise of "judicial power", and that such judicial power extends only to cases or controversies, and is capable of application only when a question is submitted *by a party* who asserts his rights in the form prescribed by law. *Osborn* v. *U. S. Bank,* 9 Wheat. 738, 819 (1824); *Ex parte State of Oklahoma,* 37 F.

(2d) 862 (C. C. A., 10th, 1930); 45 F. (2d) 1019 (C. C. A., 10th, 1930); 2 *Story on the Constitution,* Section 1646 (3rd Ed., 1858); and 2 *Watson on the Constitution,* 1088 (1910). In line with this principle it is settled that district courts cannot adjudicate matters which are not tendered by the pleadings before them, and that any attempt on their part to do so is without legal effect and is void. *Reynolds* v. *Stockton,* 140 U. S. 254, 266, 270-271 (1891); *Barnes* v. *Chicago &c. Ry.,* 122 U. S. 1, 14 (1887); *U. S.* v. *Goldstein,* 271 Fed. 838, 845 (C. C. A., 8th, 1921); *Osage Oil & Refining Co.* v. *Continental Oil Co.,* 34 F. (2d) 585 (C. C. A., 10th, 1929); *J. P. Jorgenson Co.* v. *Rapp,* 157 Fed. 732 (C. C. A., 9th, 1907); *Munday* v. *Vail,* 34 N. J. L. 418 (1871).

Petitioner asserts, however, that the order of reference was an interlocutory and discretionary order and that mandamus does not lie to control a discretionary order. That is generally true when the exercise of discretion is within the limits of the court's jurisdiction; but mandamus and prohibition are always available to prevent a lower court from exceeding its power or jurisdiction, without regard to the manner in which such excess of power or jurisdiction is attempted. Thus, in *In re Winn,* 213 U. S. 458 (1909), this Court said (p. 467):

> "The respondent, however, insists that mandamus will not lie to control the judgment or judicial discretion of the court to which the writ is proposed to be directed. This is true where the judgment or judicial discretion is within the limits of jurisdiction, but not otherwise."

It has been specifically held that mandamus is applicable to orders of reference which exceeded the Court's jurisdiction. *Ex parte Northern Pacific Ry. Co.,* 280 U. S. 142 and 530 (1930); *Grable* v. *Killits,* 282 Fed. 185 (C. C. A., 6th, 1922), cert. den., 260 U. S. 735 (1923); see also: *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701 (1927); *Ex*

parte Peterson, 253 U. S. 300 (1920); *Simkins, Federal Practice*, Sec. 498 (1938).

Petitioner further asserts that the decree of the court below violates Rule 23(c) of the Rules of Civil Procedure, which provides that "A class action shall not be dismissed or compromised without the approval of the Court". That rule was intended to prevent one member of a class from prejudicing the rights of other members of a class by compromising or dismissing an action without notice to them. No such situation is presented here. The case of *Speese* v. *Webster-Eisenlohr, Inc.* has not been dismissed (R. 6a) and, as pointed out by the court below (R. 127), it cannot be dismissed without approval of the District Court. Nor has said case been compromised. Respondent made no arrangements whatever with the plaintiff Speese looking to the termination or settlement of said action. Its offer to purchase the preferred stock was made to *all* holders of preferrd stock, and the persons then owning plaintiff's stock merely took advantage of such offer.

Furthermore, nothing was done to change in any way the rights of any members of the class (*i. e.*, the preferred stockholders). The question as to whether, under respondent's Charter and By-Laws, the preferred stock had the right to vote together with the common stock, or whether it had the exclusive right to vote, was still pending before the District Court after, as well as before, respondent made its offer to its preferred stockholders. Any other preferred stockholder could have intervened in the action (and respondent stipulated not to oppose any such intervention—R. 127), and continued the litigation. The preferred stockholders who had not accepted the offer and turned in their stock were so advised (R. 35a-36a), but none has ever sought to intervene.

Whenever the point has arisen, the District Courts have held that a purchase of stock does not constitute a "com-

promise" of the action within the meaning of Rule 23(c), *Malcolm* v. *Cities Service Co.*, 2 F. R. D. 405 (1942); and that until application is made to the court for compromise or dismissal there is nothing for the court to act on, *Heesch* v. *Pittsburgh Steel Co.*, 40 F. Supp. 243 (1941).

Finally no statute or rule can confer on district courts the investigatory powers sought to be bestowed by the order of reference. As heretofore indicated, under the Constitution district courts are limited to the exercise of judicial powers.

It is unnecessary to refer to any of the cases cited by petitioner because mere inspection thereof will show that none of them is in any way in conflict with the decision of the court below.

Conclusion.

The petition for a writ of certiorari should be denied because it was filed too late. Apart from this jurisdictional defect, the petition should be denied because the decision of the court below is clearly correct, and there is no conflict of decisions or other ground justifying certiorari. Moreover, the petition arises on peculiar facts which in no event can involve issues of general application.

Dated: May 10, 1945.

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Appendix.

Judge Kalodner's charges of fraud are groundless. Had they been made by one holding a less responsible position than his they might well be ignored.

Respondent, a Pennsylvania corporation, engaged in the manufacture of cigars, had outstanding 5,037 shares of 7% cumulative Preferred Stock (R. 27a, 31a).

During the years of the depression, respondent's operations were unprofitable and no dividends were paid on its preferred stock after April, 1931 (R. 16a). At the end of the year 1942, the accumulated dividend arrears amounted to $82.25 per share (R. 31a).

By 1940 an operating deficit of approximately $921,000 had accumulated and while respondent had an earned surplus applied to preferred stock retirements (such retirements having been made prior to the depression) of over $1,000,000, respondent, because of charter restrictions, could not use this surplus to offset the deficit.

Beginning with 1940, respondent's operations began to be profitable and by the end of 1942 its deficit had been reduced to $268,955.15 (R. 31a).

In May, 1942, almost a year prior to the commencement of the *Speese* suit, respondent's directors appointed a committee to consider ways of funding or otherwise retiring the preferred stock and accumulated dividends. Several plans were considered, one of which was to offer new $5 preferred shares for the old shares in the ratio of 1¾ new shares for each old share plus accumulated dividends, but when this plan was taken up with Mr. Cullman, who for many years had been respondent's chief executive officer and a director, and with Mr. Cohen, a director for a number of years, who, together, owned more than one-half of respondent's preferred stock, they indicated that for tax reasons they could not accept it (R. 69a-70a, 113a-114a).

Discussions were then had looking toward a purchase of respondent's preferred stock for cash and Messrs. Cullman and Cohen advised that they and certain interests affiliated with them, which owned preferred shares, would

accept $150 per share, flat, for their stock. Respondent then consulted its own bankers and other bankers and was advised that in view of respondent's progressive business improvement, arrangements for such a purchase could be made without impairing respondent's capital position or bank credit. Thus assured of the cooperation of the largest holders of its preferred stock, and of the feasibility of the proposal, respondent arranged that Messrs. White, Weld & Co. would acquire all shares which were offered at this price, taking care of the necessary checking of transfer papers and the like, and would hold the shares for 120 days, by the end of which time, respondent would acquire them at the same price. For its services, Messrs. White, Weld & Co. were to be paid $10,000 plus actual carrying charges not exceeding 1% per annum on monies expended (R. 69a-70a, 114a).

Respondent and Messrs. Cullman and Cohen all felt that if any such purchase of preferred shares was to be made, each preferred stockholder should have the opportunity of disposing of his shares at the same price (R. 114a).

While these discussions and negotiations were under way, plaintiff Speese, on February 1, 1943, served his complaint in the *Speese* action. Bertram K. Wolfe, Esq., attorney for plaintiff Speese, advised that he also represented other holders of preferred stock with holdings aggregating about 1,200 shares. Thereupon, Mr. Wolfe was invited to consider the aforesaid plan which respondent had worked out for the purchase of preferred shares. Mr. Wolfe was advised fully of how the proposed plan had originated and developed and was asked to say whether he considered the price offered a fair one. He said he considered the price fair and would advise those shareholders he represented to accept it and would assist in submitting the offer to them, but that he wanted the price of $150 per share to be net to them, *i.e.*, he wanted respondent to pay his compensation for his services in submitting the offer and in representing plaintiff in the *Speese* suit (R. 114a).

The figure Mr. Wolfe first mentioned for his compensation was considered much too high by respondent, which pointed out that it had nothing except Mr. Wolfe's statement to show he represented anyone other than Speese. Mr. Wolfe met this point by agreeing to supply a list showing the names, addresses and holdings of the preferred stockholders he represented, and it was finally arranged that respondent would pay him at the rate of $7.50 per share for each share on that list which accepted the offer. Such compensation was to be in lieu of any other compensation to Mr. Wolfe and of any allowance to him by the Court in the *Speese* suit (R. 112a-113a).

Respondent considered this arrangement with Mr. Wolfe advantageous. In the course of the *Speese* suit, although no evidence had been received and no argument on the merits of that suit had been heard, Judge Kalodner had stated that he thought plaintiff's position as to the meaning of "full voting power" sound. Although subsequently he had stated that his expression of opinion was not to be taken as final,[1] nevertheless, respondent and its counsel could not ignore this evidence of Judge Kalodner's initial impression in the matter and were aware that if the *Speese* suit was decided in favor of plaintiff's contentions, a substantial allowance to Mr. Wolfe would undoubtedly be made by the Court. The aforesaid arrangement relieved respondent from the risk of a large allowance to Mr. Wolfe.

There was no agreement or understanding with Mr. Wolfe as to plaintiff's shares or the shares of any other stockholder represented by Mr. Wolfe except that Mr. Wolfe was to submit the offer to them and advise them that in his opinion it was fair and should be accepted.

After the foregoing arrangements, the offer in question was made to all respondent's preferred stockholders on March 26, 1943.

Judge Kalodner's charge of fraud appears to be based primarily on a statement contained not in respondent's

[1] Although the statements referred to are not included in the abbreviated record before this Court, a reference to them will be found at page 67a of the record.